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In the Supreme Court of the United States

OCTOBER TERM, 1941

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

A. H. BELO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

A. H. BELO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on June 27, 1941, affirming the judgment of the United States District Court for the Northern District of Texas, Dallas Division, dated February 4, 1941, and filed February 19, 1941, which dismissed the cause with prejudice.

OPINIONS BELOW

The opinion of the district court (R. 185–189) is reported in 36 F. Supp. 907. The opinion of the circuit court of appeals (R. 485–496) is reported in 121 F. (2d) 207.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 27, 1941 (R. 497). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The respondent, in anticipation of the Fair Labor Standards Act, made agreements with each of its employees setting out a basic hourly rate of pay, but with a guaranty, for irregular work weeks which included varying amounts of overtime, of a fixed weekly salary equal to his prior salary. The specified hourly rate was determined by dividing the employee's weekly salary by 60. The question is whether the arbitrary rate of pay specified in the agreement is the "regular rate of pay" upon which overtime compensation is to be computed under section 7 of the Act.

STATUTE INVOLVED

The relevant provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

Since a date prior to October 24, 1938, the effective date of the Fair Labor Standards Act of 1938, the respondent has been engaged at Dallas, Texas, in the publication of a daily newspaper, *The Dallas Morning News*, with a circulation of over 100,000 (R. 378), and the operation of a 50,000-watt radio station, WFAA, licensed by the Federal Communications Commission (R. 371–372). Until December 31, 1940, respondent also published the *Semi-Weekly Farm News*, with a circulation of about 100,000 (R. 379). More than 1,800 copies of the *Morning News* are shipped daily in interstate commerce (R. 378–379), and about 24,000 copies of each issue of the *Farm News* were shipped in interstate commerce (R. 379). Respondent is a member of the Associated Press (R. 373) and receives the services of the United Press (R. 373, 375). With a few exceptions the same employees were engaged in putting out the two publications (R. 382).

The total number of employees in respondent's publishing plant and radio station is about 600 (R. 7, 82). Before October 22, 1938, most of its employees received fixed weekly salaries, regardless of the number of hours worked a week (R. 9, 82–83). There was no regular schedule of hours, but the general authorized maximum was 48 hours a week for men and 44 hours for women (R. 63–64).

On October 22, 1938, the respondent, in anticipation of the Fair Labor Standards Act (R. 9, 46, 85–88), issued to each of its salaried employees a printed notice (R. 467–473) containing a paragraph in the following form:

> In order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic rate of pay will be * * * 67 * * * cents per hour for the first forty-four hours each week, and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half time such basic rate above mentioned, with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand, a sum not less than $40.00.

The individual notices varied only as to the name of the employee, the amount of the "basic rate," and the amount of the weekly "guaranty" (R. 467). They were signed by the employees to whom they were addressed and returned to the respondent (R. 470). In these notices the employer arrived at the employee's "basic" hourly rate by dividing the existing weekly wage by an arbitrary divisor, generally 60 (R. 62, 88–89), and the amount of the weekly salary before October 22, 1938, was stated as the weekly "guaranty" (R. 86). Under this arrangement an employee

could work as much as 54½ hours a week during the first year after the effective date of the Act without any compensation in addition to his weekly salary; during the second year, 54 hours; and, after October 24, 1940, 53⅓ hours (R. 89, 131–132, 390).

After October 22, 1938, respondent's employees continued to work as before a number of hours varying from week to week but the median figure was about 48 hours for men and 44 hours for women, and the employees received the same weekly salaries. In most weeks the statutory maximum hours were exceeded. (R. 194–309, 310–337.)[1] In only a very few cases did employees who worked hours in excess of the statutory maximum receive compensation in addition to their weekly salaries, and then only when they worked more than 54½, 54, or 53⅓ hours (R. 273, 276, 314–315, 319, 326–327, 328, 332, 334, 336–337).

On August 12, 1940, the petitioner filed a complaint (R. 1–5) for an injunction under section 17 of the Fair Labor Standards Act, alleging that the respondent had violated sections 7 (a) (1), 7 (a) (2), and 15 (a) (2) of the Act by failing to compensate its employees for hours in excess of the statutory maximum workweeks at rates not less than one and one-half times the regular rates at which they were employed. The complaint

[1] If an employee received an increase in weekly pay, he signed a new notice with a new "basic" rate and a new weekly "guaranty." In a number of instances the new notice was signed two months or more after the actual raise in pay (R. 54, 195, 313, 472).

also alleged violations of section 15 (a) (1) of the Act in transporting, shipping, delivering, and selling in interstate commerce goods in the production of which employees were employed in violation of Section 7. The respondent's answer (R. 7–22) denied that respondent was subject to the Act or had violated the Act. It also denied the constitutionality of the Act if applicable to respondent and its employees and claimed exemption from sections 6 and 7 by virtue of the exemption in section 13 of "retail or service" establishments.

The district court found and ruled that the respondent was subject to the Fair Labor Standards Act but had not violated it (R. 185–189), and dismissed the complaint (R. 457). On appeal the circuit court of appeals affirmed (R. 497).

REASONS FOR GRANTING THE WRIT

1. The Administrator of the Wage and Hour Division has consistently interpreted section 7 as a regulation of hours which attaches to each overtime hour a penalty in the form of one-half the employee's "regular rate." Accordingly, he has construed the term "regular rate" to mean the rate obtained for each week by averaging the weekly wage over the number of hours worked.[2]

[2] This method of determining the "regular rate" is set out in paragraphs 6 to 14, inclusive, of Interpretative Bulletin No. 4 of the United States Department of Labor, Wage and Hour Division (R. 396–401).

The "regular rate" of an employee paid a fixed weekly wage for an indefinite number of hours would be obtained for each week by dividing the amount of the wage by the number of hours worked.

The court below, on the other hand, ruled that the employer and the employee may by contract establish an arbitrary figure as "the regular rate at which he is employed," so long only as that figure is above the minimum wage fixed by the statute. The decision seems to rest upon the basic proposition that section 7 was designed to regulate minimum wages and not maximum hours (R. 490–491, 494). But both the wording of the section and the evidence of congressional purpose[3] show that the object of section 7 was to afford an inducement to observe maximum hours. This Court in *United States* v. *Darby,* 312 U. S. 100, 125, held that section 7 is within the legislative power to fix maximum hours, and in *Bunting* v. *Oregon,* 243 U. S. 426, upheld a similar state statute as a regulation of maximum hours and not of wages.

A collateral ground of the decision below was that Congress must be supposed to have intended to leave respondent and its employees free to contract as they chose as to the wage rates upon which overtime compensation is to be based. (R. 489–

[3] See S. Rpt. No. 884, 75th Cong., 1st Sess., p. 4; H. Rpt. No. 1452, 75th Cong., 1st Sess., pp. 7, 9; 81 Cong. Rec. 7804, 7807, 7871, 7938, 7941, 8345–8346; 82 Cong. Rec. 1391, 1395, 1401, 1415, 1470, 1480, 1486, 1490, 1505, 1601, 1672, 1696.

491, 494). But from *Holden* v. *Hardy*, 169 U. S. 366, to *United States* v. *Darby*, 312 U. S. 100 (1941), this Court has consistently ruled that private agreements inconsistent with statutes regulating employment relations must yield to the broader public policy of those statutes.[4]

The court below relied upon the *bona fides* of the contracts between the respondent and its employees (R. 486, 488, 495). But whether the contracts be *bona fide* or procured by fraud or duress, the issue under section 7 is whether the hourly rate set out in the contract is actually the "regular rate at which the employee is employed."

2. The decision below is in conflict with the decisions of numerous district courts and of state courts[5] which have held that an employee's "regular rate" is his hourly rate of earnings determined from the facts of hours worked and wages

[4] It is, of course, familiar learning that a laborer may not contract away the protection of a remedial statute. *United States* v. *Morley Const. Co.*, 98 F. (2d) 781, 788 (C. C. A. 2d, 1938); *National Labor Relations Board* v. *American P. & C. Corp.*, 113 F. (2d) 232 (C. C. A. 9th, 1940); *Waterman S. S. Corporation* v. *Labor Board*, 119 F. (2d) 760 (C. C. A. 5th); *Larsen* v. *Rice*, 171 Pac. 1037 (Wash., 1918); *Montgomery Ward & Co.* v. *Lusk*, 52 S. W. (2d) 1110 (Texas Civ. App., 1932); *City of Glendale* v. *Coquat*, 52 P. (2d) 1178 (Arizona, 1935); *Goebel* v. *Elliott*, 35 P. (2d) 44 (Wash., 1934); *Short* v. *Bullion-Beck & Champion Min. Co.*, 57 Pac. 720 (Utah, 1899); *Cato* v. *Grendel Cotton Mills*, 129 S. E. 203 (S. C., 1925); *Groves* v. *Adelman*, 4 Wage Hour Rept. 274 (Munic. Ct. D. C. Feb. 28, 1941).

[5] Actions under Section 16 (b) of the Act have been brought by employees in the state as well as federal courts.

paid.[6] A number of courts have expressly held that the provisions of section 7 may not be modified or evaded by contract.[7] On the other hand, three decisions of district courts are in apparent

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[6] *St. John* v. *Brown*, 38 F. Supp. 385 (N. D. Tex.); *Abadie* v. *Cudahy Packing Co. of Louisiana*, 37 F. Supp. 164 (E. D. La.); *Emerson* v. *Mary Lincoln Candies*, 20 N. Y. S. (2d) 570 (Sup. Ct. Erie Co., 1940), affirmed 261 App. Div. 879 (now on appeal to New York Court of Appeals); *Haddad* v. *Beckerman Shoe Corp.*, 4 Wage Hour Rept. 329 (Ct. Comm. Pleas, Berks Co., Pa., May 5, 1941); *Angel* v. *Dayton Veneer & Lumber Mills*, 1 Labor Service, 11,979 (M. D. Ga., June 9, 1941) (Prentice-Hall); *Boylan* v. *Liden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., Ingham Co., Feb. 25, 1941); *Floyd* v. *DuBois Soap Co.*, 4 Wage Hour Rept. 77 (Ct. Comm. Pleas, Hamilton Co., Ohio, Feb. 6, 1941); *Moss* v. *Postal Telegraph-Cable Co.*, 4 Wage Hour Rept. 291 (M. D. Ga., May 16, 1941); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla., June 19, 1941); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y., N. Y. Co., June 3, 1941); *McMillan* v. *Wilson & Co., Inc.*, 4 Wage Hour Rept. 409 (Minn., Ramsey Co., June 13, 1941); *Eichkorn* v. *Kilkenny*, 1 Labor Service, 11,542 (Ct. Comm. Pleas, Passaic Co., N. J., Dec. 21, 1939) (Prentice-Hall); *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn., Nov. 25, 1940); *Wagner* v. *Field*, 4 Wage Hour Rept. 329 (Super Ct. Allen Co., Ind., May 19, 1941); *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300 (E. D. Tenn.); *Klotz* v. *Ippolito*, 4 Wage Hour Rept. 444 (S. D. Tex., July 21, 1941); *Drake* v. *Hirsch*, 4 Wage Hour Rept. 446 (N. D. Ga., Aug. 8, 1941).

[7] *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754 (D. Minn., now on appeal to the Circuit Court of Appeals for the Eighth Circuit); *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex. Dec. 10, 1941); *Fleming* v. *Atlantic*, 4 Wage Hour Rept. 353 (N. D. Ga. June 25, 1941); *Williams* v. *General Mills, Inc.*, 4 Wage Hour Rept. 421 (N. D. Ohio, July 3, 1941).

agreement with the decision below.[8] It seems evident that, unless the conflict in decisions among the lower courts be resolved, there will continue to be litigation in large volume and with contradictory results.

3. If the decision below stands, most weekly salary arrangements can be converted by "contract" into arrangements for minimum or low basic hourly rates requiring no additional compensation for workweeks in which the statutory maximum is exceeded.[9] A number of contractual devices in all essentials the same as the one employed in this case have already been before the courts (see note 7, *supra*). It is estimated that more than a million and a half employees subject to the provisions of the Fair Labor Standards Act are directly or potentially affected by the availability of these contractual devices.[10]

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[8] *Missel* v. *Overnight Motor Transportation Co.*, 4 Wage Hour Rept. 419 (Md. 1941), now on appeal to the Circuit Court of Appeals for the Fourth Circuit; *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90 (N. D. Tex. 1940); *Bumpus* v. *Continental Baking Co.* (W. D. Tenn., April 29, 1941), now on appeal to the Circuit Court of Appeals for the Sixth Circuit.

[9] Thus, for example, a guaranteed salary of $30 a week, regardless of the number of hours worked, may be divided by a figure as high as 100 without infringing the 30-cent minimum rate. If such practice were permissible under the Act, the employee could be required to work up to 80 hours a week [$12 (40 hours straight time × 30 cents) plus $18 (40 hours overtime × 45 cents) equals $30] without any compensation in addition to his guaranteed salary.

[10] In April 1939 nearly 2,400,000 of the employees subject to the Act were working more than the maximum hours,

During the enforcement of the Act by the Administrator of the Wage and Hour Division the question of the interpretation of section 7 and the meaning of "regular rate" arises more frequently than any other single question. Every case involving section 7 of the Act necessarily turns on the meaning of "regular rate at which he is employed." It is inevitable that, until this Court has passed on section 7, differences as to its interpretation and application will increase, and the rights of employees and employers alike will remain uncertain.

CONCLUSION

Wherefore, we respectfully submit that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

CHARLES FAHY,
Acting Solicitor General.

GERARD D. REILLY,
Solicitor of Labor.

SEPTEMBER 1941.

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while the number receiving less than 30 cents an hour was estimated at under 700,000. First Annual Report of the Administrator of the Wage and Hour Division (1939), p. 36.

APPENDIX

Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060; U. S. C., Supp. V, Title 29, Sec. 201 et seq.):

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common car-

rier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order or the Administrator issued under section 14;

* * * * *

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

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